Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	§	
	§	
Ronald Brasher	§	**EB DOCKET NO. 00-156**
Licensee of Private Land Mobile Stations	§	
WPLQ202, KCG967, WPLD495, WPKH771,.	§	
WPKI739, WPKI733, WPKI707, WIL990	§	
WPLQ475, WPLY658, WPKY903, WPKY901	§	
WPLZ533, WPKI762 and WPDU262	§	
Dallas/Fort Worth, Texas	§	
	§	

OPPOSITION TO MOTION TO REOPEN RECORD
TO ACCEPT ADDITIONAL EXHIBIT INTO EVIDENCE

TO THE HONORABLE ARTHUR I. STEINBERG, ADMINISTRATIVE LAW JUDGE:

Pursuant to 47 C.F.R. §1.45(b), David Brasher and Diane Brasher hereby file this Opposition to the Motion to Reopen Record to Accept Additional Exhibit into Evidence. Counsel for David and Diane Brasher have reviewed both the Motion to Reopen the Record to Accept Additional Exhibit into Evidence (the "*Motion*") filed by the Bureau and the Opposition to the Motion filed by Ronald Brasher, Patricia Brasher and DLB Enterprises, Inc, d/b/a Metroplex Two-Way. David and Diane Brasher join in the opposition to the Bureau's Motion and file this Opposition to offer additional grounds under which the Motion must be denied. In support of this Opposition, the Brashers would show the Court the following:

I. Introduction

1. It is difficult to discern from the Motion the specific theory the Bureau relies on to have the Court admit the Affidavit of Gale Bolshover. The Motion appears to be offering the Affidavit under one of two theories, either: (a) pursuant to the Bureau's interpretation of comments from the Court that the Bureau claims kept the record open; or (b) if the record has been closed, the affidavit should be viewed as "newly discovered evidence" that could not have been offered at trial notwithstanding the exercise of due diligence. Under either theory, the Bureau's late attempt to admit the second supplemental opinion of its expert must be denied. First, the Bureau failed to follow the proper FCC procedure for keeping the record open for additional evidence, as it did not obtain a stipulation from the Brashers' counsel waiving their rights to cross-examination and presentation of rebuttal evidence. Second, the Bureau has had in its possession the documents to which the alleged "newly discovered evidence" refers for over two years while concurrently possessing the knowledge that one of its friendly witnesses had denied authoring the signature.

II. The "Contemplated at the Hearing" Justification

2. The Bureau has not followed the proper FCC procedures in seeking to admit the Affidavit of Gale Bosover in evidence. Title 47 provides specific guidance for the admission of additional exhibits after the hearing is concluded. *See,* 47 C.F.R. §1.258. That provision states, "in the discretion of the presiding officer, the record may be closed as of a future specified date in order to permit the admission into the record of exhibits to be prepared: ***Provided*, The parties to the proceeding stipulate on the record that they waive the opportunity to cross-examine or present**

evidence with respect to such exhibits (emphasis supplied)." In this case, the Bureau apparently contends its counsel indicated she would like the opportunity to offer additional expert opinions from Ms. Bolsover and that the Court favorably responded to this suggestion. However, the Bureau does not represent that this notional colloquy (which did not occur) also contains a waiver from the Brashers of their rights to cross-examination or present evidence in connection with the receipt of additional exhibits from Ms. Bolsover. Neither is it suggested that such stipulation was made on the record. Thus, there is no procedural predicate that permits the reopening of the record for the additional exhibit containing the second set of supplemental opinions from the Bureau's forensic witness. Lawyers are in a profession that requires the adherence to specific and pre-established rules necessary to the orderly resolution of disputes. A failure, as in this case, to follow these rules has adverse consequences for the noncompliant advocate. Accordingly, this theory for admitting the proffered exhibit cannot provide the basis for granting the relief requested by opposing counsel.

III. The "It's Newly Discovered Evidence" Approach

3. If, on the other hand, the Bureau seeks to introduce the Affidavit under the theory that, though the record was closed at the hearing, it should be reopened to admit "new evidence," then that tactic too must fail. Under the cases establishing the standard for reopening the record to accept additional evidence, the Bureau must: (1) present "newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier;" and (2) show that the newly discovered evidence presents a substantial and material likelihood that potentially disqualifying

misconduct has occurred. *In re Evergreen Broadcasting Co.*, 7 FCC Rcd 6601, 6602 (1992). In this case, the Court need not consider whether the "evidence" offered by the Bureau presents evidence of misconduct, because the Bureau utterly fails to satisfy the first prong of the *Evergreen* test.[1/]

4. The Bureau claims that the Affidavit of Gale Bolsover, the Bureau's expert witness who appeared and offered testimony before this Court, constitutes "newly discovered evidence." A review of the record in this case positively establishes the precise opposite conclusion. It is undisputed that:

(a) The questioned signature was in the Bureau's possession in April 1999. *See,* Bureau Exhibit 19, page 00200.

(b) At or near this same time in 1999, the Bureau was aware that Ms. Norma Sumpter had decided to deny her authorship of the subject signature. *See,* Bureau Exhibit 45, page 3.

(c) Well in advance of the depositions in Dallas, which began in late November 2000, the Bureau had filed papers indicating its awareness of the perceived need to obtain the assistance of a forensic document examiner.

CONCLUSION

Thus, as is apparent from the above discussion, there is no change in circumstance that would excuse the failure to request this scope of opinion until after the close of the record. The Motion

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[1/] Though David and Diane Brasher would seriously contest the probative value of the Bureau's "evidence" if the Court were to consider it, this Opposition is certainly not the proper forum for such a contest. As noted in the Opposition to the Bureau's Motion filed by Ronald and Patricia Brasher, the Bureau has attempted to enter this opinion testimony into evidence after the record in this case has been closed without even offering the opportunity for the Brashers to cross-examine the witness regarding the testimony or to present rebuttal testimony.

should be seen for what it is: a transparent attempt to plaster over serious damage created when Ms. Bolshover provided, on balance, evidence tending to exculpate the Respondents. The most effective tool for getting at the truth is cross examination. To attempt to sneak in information the Bureau would pass off as material evidence *without subjecting it to cross examination* turns the adversarial system on its head.

WHEREFORE, ABOVE PREMISES CONSIDERED, the Brashers respectfully request the Court to deny the relief requested by the Bureau in its Motion.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

By: _____

K. Lawson Pedigo
State Bar No. 15716500
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
Telephone: 214/855-8000
Facsimile: 214/855-8200

ATTORNEY FOR DAVID AND DIANE BRASHER

CERTIFICATE OF SERVICE

A copy of this Opposition to Motion to Reopen Record to Accept Additional Exhibit into Evidence on behalf of David Brasher was served on counsel of record listed below on the 26th of April, 2001:

Charles W. Kelley
Judy A. Lancaster
William H. Knowles-Kellett
Investigations and Hearings Division
Federal Communications Commission
445 12th Street, NW Room 3B-443
Washington, DC 20554

Michael Higgs, Esq.
Schwaninger & Associates
1131 H. Street, NW, Suite 500
Washington, DC 20005

Administrative Law Judge Arthur I. Steinberg
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

John McVeigh, Esq.
12101 Blue Paper Trail
Columbia, MD 21044-2787

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